***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. ~~430-64~~ 19071

973

RAYMOND CRUMP, JR., APPELLANT

vs.

~~DONALD CLEMMER~~ Sam Anderson, ET AL., APPELLEES

On Appeal From the United States
District Court for the District of Columbia

# BRIEF FOR THE APPELLANT

DOVEY J. ROUNDTREE
JEROME SHUMAN
1822 11th Street, N. W.
Washington, D. C.
Attorneys for Appellant

## QUESTIONS PRESENTED

(1) Whether an accused who is neither in custody for another offense nor arrested pursuant to an indictment may be validly deprived of the preliminary hearing which is conferred upon him by Rule 5 of the Federal Rules of Criminal Procedure?

(2) Whether a grand jury indictment during the continuance of a preliminary hearing destroys the right of the accused to have a preliminary hearing?

## INDEX AND TABLE OF CASES

### Subject Index



### Table of Cases

Miscellaneous

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 430-64

RAYMOND CRUMP, JR., APPELLANT

vs.

DONALD CLEMMER, ET AL., APPELEES

On Appeal From the United States
District Court for the District of Columbia

# BRIEF FOR THE APPELLANT

## JURISDICTIONAL STATEMENT

The petitioner was arrested October 12, 1964, and indicted on a charge of first degree murder October 19, 1964. He was arraigned October 30, and pleaded not guilty to the indictment. Petitioner was never given a preliminary hearing. On October 30, 1964 petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia, based on the denial of a preliminary hearing. The District Court entered an order denying the petition on November 20, 1964. The petitioner ap-

pealed to this Court. The District Court's jurisdiction was based on 28 U. S. C. 2241, and the jurisdiction of this Court is invoked pursuant to 28 U. S. C. 2253.

## STATEMENT OF THE CASE

The petitioner, Raymond Crump, Jr. was arrested on October 12, 1964 at approximately 1:30 p.m. and was booked and charged with first degree murder in the death of one Mary Meyer. The arrest was made pursuant to information and statement received by the police from two persons who allegedly saw the petitioner at the scene of the crime standing near the body of the deceased. The petitioner was taken before the United States Commissioner where he was ordered held without bail. The Commissioner informed the petitioner of his rights and petitioner requested counsel. The hearing before the Commissioner was continued for the purpose of contacting the Legal Aid Agency and pending a Coroner's inquest. The date set for the preliminary hearing was October 19, 1964. This hearing was not held. On October 19, 1964 a grand jury was convened which indicted petitioner of murder in the first degree. Petitioner was given no notice of the grand jury proceeding and did not learn of the indictment until later. On the date scheduled for the preliminary hearing petitioner appeared before the

United States Commissioner with his assigned counsel. Counsel requested a reporter and the production of witnesses. The prosecution informed the Commissioner that the petitioner had already been indicted by the grand jury. Upon being so informed the Commissioner declined to conduct the hearing.

On October 19, 1964 a corpner's inquest was held. The inquest was conducted in a prejudicial manner. The only testimony given was that of Detective Crook. Detective Crook testified as to what another police officer told him the two alleged eyewitnesses said. The two alleged eyewitnesses were never produced. When counsel for petitioner asked that they be subpoened to appear the request was denied. The coroner said that counsel knew that the hearing was going to be held, and if he wanted those eyewitnesses at the hearing he should have produced them himself. Petitioner made timely objections to the manner in which the hearing was conducted.

## STATUTES AND RULES INVOLVED

The pertinent portions of the statutes and rules involved are set forth in Appendix I.

## STATEMENT OF POINTS

1. An accused who is neither in custody for another offense nor arrested pursuant to an indictment may not validly be deprived of a preliminary hearing which is conferred upon him by Rule 5 of the Federal Rules of Criminal Procedure.

2. The holding of this Court in the case of Blue v. United States dictates that the petitioner be given a preliminary hearing.

3. The plain language of Rule 5 of the Federal Rules of Criminal Procedure requires that the petitioner be given a preliminary hearing.

4. The preliminary hearing is a crucial stage in the criminal proceeding which cannot be eliminated without prejudicial effects to the accused.

5. A grand jury indictment does not destroy the right to a preliminary hearing.

## SUMMARY ARGUMENT

The District Court's decision denying relief on the ground that the petitioner is not entitled to a preliminary hearing is contrary to contemporary jurisprudential authority.

It misconceives the function of a preliminary hearing as an integral part of the criminal process, and conflicts with the legislative mandate expressed in Rule 5(c) of the Federal Rules of Criminal Procedure. Recent decisions by both this Court and the Supreme Court of the United States make it patently clear that a person accused of crime and entwined in the criminal machinery is entitled to a preliminary hearing as a matter of right. In the District of Columbia this right is both constitutional and statutory. The right to a preliminary hearing is not divested, nor are the prejudicial effects of its denial dissipated by a grand jury indictment.

## ARGUMENT

### POINTS I AND II

AN ACCUSED WHO IS NEITHER IN CUSTODY FOR ANOTHER OFFENSE NOR ARRESTED PURSUANT TO AN INDICTMENT MAY NOT VALIDLY BE DEPRIVED OF A PRELIMINARY HEARING WHICH IS CONFERRED UPON HIM BY RULE 5 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

THE HOLDING OF THIS COURT IN THE CASE OF BLUE V. UNITED STATES DICTATES THAT THE PETITIONER BE GIVEN A PRELIMINARY HEARING.

The essentialness of a preliminary hearing to criminal proceedings in the United States District Court for the District of Columbia was well stated by this Court in Blue v. United States, U. S. App. D. C. No. 18,401 (October 29, 1964, Slip Opinion). In the Blue case, William Blue made an un-

counselled waiver of his right to a preliminary hearing. He was subsequently indicted, tried and convicted. After the trial on the merits Blue sought to have his conviction reversed and the indictment dismissed because of the lack of a preliminary hearing. The Court took full cognizance that the uncounselled waiver was ineffective, and discussed at length the fact that the defendant was wrongfully deprived of the preliminary hearing to which he was entitled. The defendant in the Blue case did not prevail only because he sought an inappropriate remedy at an improper time. The Court indicated that "visible flaws in the early stages of the criminal process [should be] asserted, adjudicated, and if necessary, corrected before a full-scale trial takes place." Thus, the Court very explicitly set forth the proper time and remedy for one denied a preliminary hearing when it said: "It is...intervention by habeas corpus or mandamus prior to trial that we conceive to be the remedy best calculated to combine adequate relief to accused persons with the least burden to the Government and the courts." Id at 13.

The facts in the case at bar completely satisfy the rule laid down by this Court in Blue. The petitioner here is seeking the proper remedy--habeas corpus. The petitioner is seeking this remedy at the proper time--prior to trial.

In the Blue case the Court in denying the remedy dilatoriously sought said:

> "In weighing the problem immediately before us, we cannot be unmindful that counsel apparently did not see any compelling necessity to seek pre-trial relief in order to prepare for trial. Nor, at the trial itself, did he make any intimation, by formal objection or otherwise, that appellant was being unfairly exposed to, or surprised by, the introduction of evidence that he could have successfully rebutted had he had a pre-trial hearing. And no more than in the trial court have claims of this nature been advanced on this appeal....Accordingly, we cannot find that the Commissioner's failure to accord appellant a meaningful opportunity to elect to have a preliminary hearing, and thereby to acquit himself in greater detail with the case against him, so handicapped him in his first trial as to require a second." Id at 14.

Implicit in this statement is an indication that even though the defendant was seeking the wrong remedy at the wrong time the Court might have granted him some relief had he shown that he had been handicapped in his earlier trial by not having had a preliminary hearing. This language of the Court discloses one of the compelling reasons for granting the petitioner in the instant case the preliminary hearing that he has been wrongfully deprived of. Here counsel does need pre-trial relief in order to effectively prepare for trial and the defense of the petitioner. Counsel has no other means of obtaining and preparing necessary information. Unlike the Blue case the Court in the instant case cannot look at the facts in retrospect and say that the

petitioner has not been prejudiced or handicapped in the preparation for his trial. It is impossible to estimate the degree and extent to which the petitoner will be prejudiced until after the trial. The Court should not adopt a wait-and-see rule in this case. For the Court to wait until after the trial and then send the case back only after a determination that the accused had been handicapped by the denial of a preliminary hearing would place an undue burden on both the accused and the judicial process.

Moreover, the case at bar presents a much more outlandish denial of the accused's rights than did the Blue case. In Blue there was some basis, even though slight, for the claim that the defendant had waived his right to a preliminary hearing. However, in the case at bar there is not even a semblance of a waiver; petitioner was deprived of a preliminary hearing while vehemently asserting his claim to it.

In Drew v. Beard, 101 U. S. App. D. C. 198, 290 F.2d 741 (1961), the Court indicated that it would have come to the same conclusion as it did in Blue if it had decided the case before it. In Drew the committing magistrate discontinued a preliminary hearing to await the possibility of action by the grand jury. The defendant petitioned for a writ of mandamus directing the committing magistrate to hold

a preliminary hearing. While the case was pending in this Court a new preliminary hearing was scheduled, thereby rendering the case moot. In the per Curiam opinion in that case this Court stated "the members of the Court comprising this division are of the view that persons accused of crime are entitled to prompt preliminary hearings pursuant to Rule 5 of the Federal Rules of Criminal Procedure...."

In recent years the Supreme Court has taken gigantic steps towards securing to the criminally accused the procedural safeguards essential to a fair trial. See e.g. Mapp v. Ohio, 367 U. S. 643 (1961), extending the constitutional protection against self incrimination to the states); Hamilton v. Alabama, 368 U. S. 52 (1961), (extending the right to counsel to the arraignment); Escobedo v. Illinois, 84 S. Ct. 1758 (1964), (giving the right to have retained counsel during police interrogation); Malloy v. Hogan, 84 S. Ct. 1489 (1964) (extending the Fifth Amendment protection against self-incrimination to the states); White v. Maryland, 373 U. S. 59 (1963), (extending the right to counsel to the preliminary hearing). In view of this trend there can be little doubt that the Supreme Court would hold that an accused may not lawfully be deprived of his right to a preliminary hearing. In White v. Maryland, supra, the Supreme Court held that the preliminary hearing is a criti-

cal stage in the state's criminal proceeding at which an accused is entitled to counsel. It is obvious that the Supreme Court would attach as much, if not more, importance to a preliminary hearing as it did to the right to counsel at such a hearing.

The cases decided by other Courts of Appeals which have held that an accused was not entitled to a preliminary hearing are distinguishable from the case at bar. Cases such as Barber v. United States, 142 F.2d 805 (4th Cir. 1944) cert. denied, 322 U. S. 741 (1944); United States ex rel. Dilling v. McDonnell, 130 F.2d 1012 (7th Cir. 1942); Davis v. United States, 210 F.2d 118 (8th Cir. 1954), cert. denied, 345 U. S. 912 (1954); Nelson v. Sacks, 290 F.2d 604 (6th Cir.), cert. denied 368 U. S. 921 (1961), and United States v. Shields, 291 F.2d 799 (6th Cir. cert. denied, 368 U. S. 933 (1960), all involved situations in which the defendants were not taken into custody until after an indictment had been found against them. In each case the courts relied upon this fact in refusing relief based on failure to give a preliminary hearing, thus implying that their decisions would have been otherwise if the defendant had been in custody prior to indictment. Similarly, in cases such as Barrett v. United States, 270 F.2d 772 (8th Cir. 1959), and United States ex rel. Bogish v. Tees, 211 F.2d

69 (3rd Cir. 1954), the lack of a preliminary hearing was found not to be fatal because the defendant was in custody for a state offense at the time of the indictment, again implying that otherwise the conviction would be reversed.

## POINT III

### THE PLAIN LANGUAGE OF RULE 5 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE REQUIRES THAT THE PETITIONER BE GIVEN A PRELIMINARY HEARING.

Although contemporary developments in procedural safeguards for the criminally accused adequately support a constitutional right to a preliminary hearing, this Court can decide the instant case without relying upon the constitutional issues. Rule 5 of the Federal Rules of Criminal Procedure expressly confers upon one accused of crime a right to have a preliminary hearing before a United States Commissioner. When an accused is initially brought before him Rule 5(b) declares that "the Commissioner shall inform the defendant...of his right to have a preliminary examination." (emphasis added). The right to a preliminary hearing conferred by Rule 5 is expressed in absolute and mandatory terms. Informing an accused of his rights as required by Rule 5 means more than mechanically relating these rights to him. The Rule requires an imparting of knowledge which the accused may act upon. Rule 5 provides for but one exception to the obligation to afford a preliminary hearing, i.e.,

waiver by the defendant. Thus, the Rule provides that "if the defendant does not waive the examination, the Commissioner shall hear the evidence within a reasonable time." (emphasis added). In the case at bar the petitioner, Raymond Crump, Jr., did not waive his right to the hearing. Thus the Commissioner had a duty to hold a hearing and "hear the evidence."

The provision that "the Commissioner shall hear the evidence" when the defendant has not waived the preliminary hearing is as mandatory on the Commissioner as are the provisions that he"shall inform the accused of the complaint against him and of his right to counsel." If the Commissioner can sua sponte deprive a defendant of a preliminary hearing when the defendant has not waived, why can't he also refuse to inform the accused of the complaint against him and of his right to counsel.

The term "shall" in Rule 5(c) is as obligatory on the Commissioner in imposing a duty on him as it is on the police when used in Rule 5(a) where it commands that they "shall" take the defendant before the Commissioner without unreasonable delay. If the Commissioner can ignore his obligation to hear the evidence where the defendant has not waived the hearing, why can't the police also ignore their duty under Rule 5. Rule 5 contemplates no such arbitrary distinction.

In each case the accused has a statutory right imposing a correlative duty on the government. The denial of a right so conferred is constitutionally pr[illegible]ibited.

Under Rule 5 of the Federal Rules of Criminal Procedure the Commissioner has the duty to inform the accused of his rights and to determine from the evidence presented at that hearing whether there is probable cause to hold the accused. The accused must be informed of the charges against him, and the prosecution must make out a prima facie case agai[illegible]t the accused, by presenting witnesses and other evidence to show that there is probable cause to believe that the accused has commited the offense charged. The accused has the right to cross examine the witnesses presented. He has the right to have their testimony recorded and preserved. He has the right to summon witnesses by co[illegible]ulsory process and to submit evidence on his own behalf. In short, he has the right not only to put the government to its proof of probable cause to hold him, but also the right to elicit informatio which is indispensable to the preparation of his defense.

The petitioner in this case was denied all of these safegurads to a fair trial. He was informed that he had a right to counsel at a preliminary hearing, yet when he appeared for a hearing with his counsel he was denied the opportunity for the use of counsel. He was told that he had

a right to face the witnesses against him and preserve their testimony, yet when he came prepared to do this he was deprived of the only stage in the proceeding when he could have exercised this right. He was appraised of a right to have a preliminary hearing only to have it snatched away from him the moment he sought to use it. To summarily deny an accused all of these judicial safeguards is to emasculate Rule 5 of its value and utility to him. To the defendant accused of crime who is so deprived, the whole process of informing him of his rights begins to sound like "a tale told by an idiot, full of sound and fury and signifying nothing."

## POINT IV

**THE PRELIMINARY HEARING IS A CRUCIAL STAGE IN THE CRIMINAL PROCEEDING WHICH CANNOT BE ELIMINATED WITHOUT PREJUDICIAL EFFECTS TO THE ACCUSED.**

To deprive an accused of a preliminary hearing is to deprive him of an opportunity to adequately prepare his defense. An opportunity for effective preparation of one's defense is a necessary ingredient in the "fundamental fairness essential to the very concept of justice." Crooker v. California, 357 U. S. 433 (1958). It is one of those immutable principles of justice which inhere in the very idea of free government which no member of the union may

disregard. Powell v. Alabama, 287 U. S. 45, 71 (1932). It is one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Herbert v. Louisiana, 272 U. S. 312, 316 (1926). The right to have counsel is regarded as essential primarily because of the importance of counsel to the preparation of the defense of the accused. See Powell v. Alabama, supra. An indictment which does not adequately apprise an accused of the charge against him is fatally defective because it renders the accused less able to prepare his defense. See United States v. Simmons, 96 U. S. 360 (1878). The granting of bail is predicate upon the theory that one who is out can better prepare his defense than one confined.

The petitioner though he may be ever so innocent yet he will unduly face the danger of conviction if he is deprived of this crucial stage in the criminal proceeding which is essential to the adequate preparation of his defense.

The denial of a preliminary hearing to petitioner deprived him of an opportunity to make discovery necessary for effective preparation of his case. At a preliminary hearing the petitioner could face the accusatory witnesses and ascertain what their testimony against him. One of the

very purposes of the preliminary examination is to provide an early opportunity for the accused to confront the witnesses against him. Wirtz v. Bolden Electric Co., U. S. App. D. C. No. 17,770 (December 31, 1963, Slip Opinion pp. 12-14). Allegedly there were two eyewitnesses who saw the petitioner near the scene of the crime. Assuming the existence of these alleged identification witnesses, the opportunity for early confrontation is undoubtedly essential. Where there are identification witnesses the accused should have an early opportunity to pin them down to the basis for their identification, to hear and see them testify as to how, when and where they had an opportunity for identification. This should be done before the identification witnesses have a chance to discuss the case with others and alter their story. "The early recording of this testimony stands as a deterrent to and method of combating subsequent variances." Comesky, Criminal Procedure in the United States District and Military Court 28.

So important is the discovery aspect of a preliminary hearing that the accused has the right to require the Commissioner to subpoena not only witnesses whose testimony will tend to exonerate him, but all material witnesses named in the complaint who have not already been called by the Government. Washington v. Clemmer, U. S. App. D. C. No.

18,602 (May 11, 1964). In Washington v. Clemmer the defendant requested that subpoenas issue to certain witnesses The Commissioner denied the request. In holding that the Commissioner should have issued the subpoenas this Court said that for the preliminry hearing the defendnt may subpoena "in addition to alibi witnesses...the complainant and other material witnesses named in the complaint who for some reason have not been called by the Government." Under the clear rule of the Washington case so recently decided by this Court the petitioner had a right to confront the alleged identification witnesses against him at a preliminary hearing.

Just as the law has evolved from trial by ordeal it is now evolving from trial by ambush. There is no valid reason for the prosecution to secrete witnesses. The aim of the prosecution should not be first to ambush and surprise the accused into a conviction, but rather to ascertain truth and achieve justice by submitting to the test of the judicial process in an adversary proceeding. Thus, it has been noted that

> "under our American system of criminal law, the accused is presumed to be innocent until he has a fair opportunity to prepare his defense and is then proven guilty beyond a reasonable doubt. These rights are unquestioned. It is also the duty of the state to seek the truth rather than

> to achieve a record of indiscriminate convictions by concealment and surprise. If pretrial discovery is found to be necessary to perpetuate these principles, it should be extended as a matter of right. The fact that the state may somehow be burdened by displaying evidence before trial, when weighed against the possibility that the defendant may not be given a fair opportunity to defend himself becomes a subordinate consideration. The state is also heavily burdened when it must prove a defendant guilty beyond a reasonable doubt, and yet the necessity of this burden is beyond debate." Krantz,"Retrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice,"42 Neb. L. Rev. 127, 130 (1962).

The preliminary examination provides an opportunity to record the testimony of witnesses while it is still fresh in their minds. This serves as a safeguard against perjured testimony and intimidation of witnesses. The testimony preserved at this tage can later be used should the witness be unavailable or incapacitated at the time of trial. Furthermore, such early testimony can be used to impeach a witness who later changes his story, or to revive the recollection of a witness whose memory has faulted.

Testimony given at the preliminary examination is likely to be more accurate than testimony made at a later stage in the proceeding. The events are fresh in the minds of the witnesses. Their opinions will not have been influenced by publicity about the trial; in other words, they will be in a better position to distinguish between what they actually perceived to have transpired and the con-

jectures and speculations of others that may have come to their attention after the event. Cross examination will be more effective as a means for ascertaining the truth from a witness who might be honestly mistaken. If a witness has made an honest mistake, the longer he is allowed to labor unchallenged under his erroneous notion, the firmer it is likely to become imbedded in his mind. Thus, a long period between the event and the trial of the accused can serve as an incubation period for fantasy. Therefore, it is desirable to record the testimony of witnesses at an early stage of the criminal process. Where a serious capital offense is charged, and the case is surrounded by such notoriety as the case at bar, a man's life may depend upon whether there has been a preliminary hearing and testimony preserved. This Court has pointed out in the past that "verbatim recording of testimony at an early stage of the process perpetuates the fresh memory of witnesses, making it available in case of subsequent death, disability or flight, and allowing impeachment or refreshing of recollection at trial. Accordingly, early recording also serves to discourage threats against witnesses and suborning of perjury." Washington v. Clem[illegible], supra at 4.

It is well established that one of the functions of a preliminary examination is to determine whether there is

probable cause to believe that a crime has been committed and whether there is probable cause to believe that it was perpetrated by the accused. People v. Norris, 197 N. E. 2d 433 (1964); Wood v. United States, 75 U. S. App. D. C. 274, (1942). United States v. Gray, 87 F. Supp. 436 (1950). In the case at bar the Commissioner made no such determination. At the time of the indictment the preliminary hearing was yet pending and undetermined, thus the indictment was premature, and without warrant or authority of law. The whole record in this regard presents an extraordinary condition of affairs, and shows an undue activity to achieve conviction without a due regard for the rights or the proprieties which should characterize proceedings of a criminal nature. The letter as well as the spirit of the law requires that a criminal proceeding should be conducted with deliberation and with every reasonable opportunity accorded the accused to show either that no offense has been committed, or that there is no probable cause for believing him to be guilty of the offense charged. The state with all the powers at its command should not be made an instrument of oppression, nor be permitted to resort to unnecessarily harsh measures in order to bring an accused to a speedy trial.

## POINT V

**A GRAND JURY INDICTMENT DOES NOT DESTROY THE RIGHT TO A PRELIMINARY HEARING.**

The indictment by the grand jury cannot cure the defect in the criminal proceeding arisng from the fact that the Commissioner did not find probable cause and made no effort to do so. See Mallory v. United States, 354 U. S. 449 (1957); McNabb v. United States, 318 U. S. 332, 343-44 (1943). A grand jury indictment by its very nature can never be a valid substitute for, or alleviate the necessity for a preliminary hearing. Indeed, the inadequacy of the grand jury proceeding was one of the reasons giving rise to the preliminary examinations. Miller, "Non-Use of Current Practices," 1964 Wisc. L. Rev. 252. The preliminary examination is a judicial hearing; the grand jury is not. The accused has a right to be present at a preliminary hearing, to have counsel represent him there, to confront and cross-examine the witnesses against him, to have testimony recorded, to have evicence excluded which does not comport with the rules of evidence, and all of the other procedural safeguards which are guaranteed by the Constitution, and considered fundamental to our scheme of ordered liberty. The grand jury proceeding does not afford these rights to the accused. It is an Ex parte proceeding. Grand juries may return indictments based on their

own knowledge or hearsay evidence, instead of an independent judicial inquiry.

A preliminary examination is essential also because the very fact of an indictment may create irreparable damage by unfavorable publicity. This can be averted where there is a reasonable possibility that the case may be dismissed if all the evidence is presented at the preliminary hearing. Comesky, supra.

An accused is entitled to both a preliminary hearing and a grand jury indictment. These are complementary safeguards. They are not alternative devices for the prosecution. Each stage in the criminal process plays a separate and indispensable role. The performance by one functionary of its role cannot cure the defects in the proceeding caused by the failure of another to perform its duty. In many cases the grand jury may never have an opportunity to find probable cause if there is a preliminary hearing and the Commissioner does not find it. Thus, to say that an indictment can cure the defects arising from a failure to provide an accused in custody with this opportunity to free himself is to make a mockery of Rule 5. The Supreme Court has recognized the necessity to afford an accused each stage of the criminal proceeding. In Mallory v. United States, supra, Justice Frankfurter reiter-

ated some of the underlying reasons for the adoption of Rule 5 and the statutes which preceded it. He quoted from an earlier opinion in McNabb where he had said:

> "The purpose of this impressively pervasive requirement of criminal procedure is plain....The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of Criminal Justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard - not only in assuring conviction of the guilty by methods which commend themselves to a progressive and self-confident society." 354 U. S. 449, 452.

In the recent Blue decision this Court spoke in a similar vain of the importance of Rule 5 and the necessity of a preliminary examination when it said that a criminal prosecution is a continuous and unitary process.

> "Each stage along the way has its own intrinsic importance as well as a frequently significant relationship to the final result. Preliminary inquiries can on occasion have great value for one charged with crime. Where a defenant is denied out of hand the opportunity to consider utilizing that value, we do not think that denial is to be swept under the rug of a grand jury indictment. Neither do we think that the availability of a remedy should depend upon the outcome of a race between counsel seeking habeas corpus or mandamus and the grand jury acting upon the charge. We therefore conclude that relief in such a situation is not to be foreclosed solely by reason of an intervening indictment." Supra at p. 11.

The preliminary examination is part of the criminal proceeding. However, under all the circumstances of this case it may well be converted into the final hearing, because of the possible prejudicial effect its denial may have upon the ultimate result of the case. See People v. Jackson, 23 Ill. 2d 263, 178 N.E. 2d 310, 315.

## CONCLUSION

For the aforesaid reasons the petitioner ask that the decision of the District Court be reversed, and the cause remanded to the District Court with instructions to vacate its order and issue a writ of habeas corpus for the release of the petitioner unless a preliminary hearing in compliance with Rule 5 is held forthwith. Petitioner further ask that this Court retain jurisdiction of cause to entertain motions to assure prompt compliance with its mandate.

DOVEY J. ROUNDTREE
JEROME SHUMAN
Attorneys for Appellant

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 19,071**
**(H.C. 430-64)**

---

RAYMOND CRUMP, JR., APPELLANT

*v.*

SAM A. ANDERSON, APPELLEE

---

**Appeal from the United States District Court for the District of Columbia**

---


DAVID C. ACHESON,
*United States Attorney.*

FRANK Q. NEBEKER,
ALLAN M. PALMER,
*Assistant United States Attorneys.*

## QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether the writ of *habeas corpus* was properly discharged, notwithstanding appellant's not having received a preliminary hearing, when his present detention arises out of a first degree murder indictment and arraignment thereunder and, when appellant did not seek to controvert the *prima facie* showing of probable cause established by that indictment?

2) Whether, in any event, the coroner's inquest was an effective substitute for a preliminary hearing when sworn testimony concerning the killing and appellant's participation therein was given at the inquest and, when appellant had the opportunity to subpoena witnesses in his own behalf but failed to do so?

# INDEX



## TABLE OF CASES

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 19,071

---

RAYMOND CRUMP, JR., APPELLANT

*v.*

SAM A. ANDERSON, APPELLEE

---

**Appeal from the United States District Court for the District of Columbia**

---

## BRIEF FOR APPELLEE

---

## COUNTERSTATEMENT OF THE CASE

On October 19, 1964, a one-count indictment was filed in the District Court charging appellant with the deliberate and premeditated murder of Mary Pinchot Meyer on or about October 12, 1964 (22 D.C. Code § 2401). On October 30, 1964 he was arraigned thereunder in Criminal No. 930-64, pleaded not guilty to the charge and committed to the custody of appellee.[1] Neither in the plead-

[1] These facts appear in the pleadings below; the Findings of Fact and Conclusions of Law of Judge Hart dated November 20, 1964;

ings nor before Judge Hart did counsel seek to affirmatively controvert the *prima facie* showing of probable cause established by that indictment. See Tr. 8-11.[2]

Appellant was originally brought before the United States Commissioner October 12, 1964, on a complaint charging him with the instant murder. The case was continued until October 23rd in order to contact the Legal Aid Agency on appellant's behalf and, to await the outcome of a coroner's inquest.

On October 19, 1964 that inquest was held. Detective Bernard D. Crook, Metropolitan Police Homicide Squad, testified that the body of Mrs. Meyer was found in the 4300 block of the C & O Canal towpath shortly after noon Monday, October 12, 1964. She had been shot two times, once in the head (C. Tr. 7).[3] Arriving at the scene after 1:00 p.m., he was informed by a Mr. Henry Wiggins, an employee of a garage in the vicinity, that at about 12:15 p.m., while on Canal Road he heard a call for help followed by what he believed to be a gunshot. He started toward the wall bordering the Canal when he heard a second gunshot. Upon reaching the wall he observed a Negro male standing above the body. He called the police who responded and flashed a lookout for the subject. Detective Warner of the Third Precinct observed appellant walking east along the railroad tracks next to the Canal. Under questioning Crump stated that he had been fishing further up the tracks. (He was walking away from the body which was approximately three-quarters of a mile up the towpath).

---

and the records in Criminal No. 930-64 of which this Court may take judicial notice. *Cf. Fletcher* v. *Evening Star Newspaper Co.*, 77 U.S. App. D.C. 99, 133 F.2d 395 (1942), *cert. denied*, 319 U.S. 755 (1943); *(Henry) Jackson* v. *United States*, 336 F.2d 579, 581 (D.C. Cir. 1964) (Opinion of Bazelon, C. J.); *Lopez* v. *Swope*, 205 F.2d 8 (9th Cir. 1953).

[2] Tr. references are to the transcript of proceedings before Judge Hart on November 9, 1964.

[3] C. Tr. references are to the transcript of proceedings before the Coroner.

Warner, seeing Detective Crook and a Sergeant d'Ambrosio summoned them over. Mr. Wiggins, who was standing next to Detective Crook, stated: "That looks like the man." Upon stepping closer he spontaneously exclaimed: "That is the man I saw standing over her. But he does not have his hat and coat on at this time." Appellant was placed under arrest.

A coat was recovered about 1:15 p.m. in the river, near the scene of the murder, and a hat was found the following morning on the river bank.

No fishing gear was recovered; appellant claimed it was lost when he fell into the river earlier. His clothing was completely saturated at this time.

An intensive search failed to produce the murder weapon. (C. Tr. 7-14).

At the outset of the inquest Mr. Edward O'Neill, of the Legal Aid Agency, asked for a continuance to obtain subpoenas for additional witnesses (C. Tr. 5).

The Coroner responded:

> ". . . I know that you are aware that this inquest was scheduled (at) approximately Friday afternoon from two to three o'clock in the afternoon. My office notified you that this inquest would take place at this time. (11:00 a.m., Monday, October 19, 1964.) You are familiar with the Coroner's Office and you know that you can subpoena witnesses, you can call witnesses and the Coroner's Jury will hear these witnesses. You had opportunity to line up anyone you wanted to . . . ." (C. Tr. 6). See 11 D.C. Code §§ 1903, 1906.

The inquest resulted in the jury's verdict that appellant was responsible for the death of Mary Pinchot Meyer (C. Tr. 18).

Later the same day appellant, represented by Mr. O'Neill, again appeared before the Commissioner and requested a hearing. The government's position then was, that while an inquest had been held and an indictment returned in the case, it was ready to afford Crump an immediate preliminary hearing. Over government objec-

tion appellant obtained a continuance of the proceedings until October 23, 1964.

On October 21, 1964, a hearing was held before the Commissioner on appellant's motion to subpoena six witnesses to the hearing under Rule 17, Fed. R. Crim. P. This motion was denied.

On October 23, 1964 appellant was represented by a Mr. Jacob Stein before the Commissioner. On that date, the motion for subpoenas was renewed and denied. The case was ultimately dismissed as moot by virtue of the return of an indictment and because a coroner's inquest had been held.

On October 30, 1964, appellant filed a petition for a writ of *habeas corpus* alleging that he was unlawfully imprisoned because:

1. His constitutional rights had been denied him for he was not confronted by his accusers.
2. He was denied a preliminary hearing.
3. He was badly beaten while in custody.
4. The coroner's inquest was inadequate because the evidence was insufficient to identify him; those that identified him were not present; the only testimony adduced at the inquest was compounded hearsay.

He later filed two amended petitions which did not differ in substance from the original petition. Present counsel was also on all these pleadings.

The Return And Answer to the petition alleged *inter alia* that appellant had been arraigned on October 30, 1964, and entered a plea of not guilty to an indictment. It further averred: "Since, petitioner does not attack the validity of the aforementioned indictment, he concedes, by implication, that he is lawfully in custody and therefore habeas corpus will not lie."

At the hearing on the writ of *habeas corpus* before Judge Hart, the Court offered to order a hearing if counsel had witnesses to present to rebut probable cause (Tr.

8, 10). Counsel did not seek to do that but sought a preliminary hearing, "where the Government would come forward to show probable cause. . . ." (Tr. 10).

The Court responded:

> "Well, if you're just looking for discovery, I'm not going to order a preliminary hearing. If you will tell what witnesses you have which would tend to cast some question about whether or not there was probable cause, whether this man had an alibi, or something of that sort, then I will take care of it if you will give me the names of such witnesses."

Counsel:

> "Well, there would be, of course, first the defendant himself. There would also be persons who allege that they saw him in the vicinity of this area."

The Court:

> "That is discovery you are looking for."

Counsel:

> "But, Your Honor, it is my belief and it is my understanding that *this he has a right to.* He has not had." (Emphasis supplied). (Tr. 10-11).

The remainder of the hearing was concerned with the taking of testimony on appellant's claim of brutality. This allegation was found to be a "wild accusation", without any basis in the credible evidence (Tr. 53). That issue was abandoned in the instant appeal.

On November 20, 1964 Judge Hart dismissed the petition finding that appellant was legally detained pursuant to the indictment and arraignment in Criminal Case No. 930-64.

## STATUTES AND RULE INVOLVED

Title 11, District of Columbia Code, Section 1903 provides:

> The coroner may summon witnesses from any part of the District to appear before him for the purposes

of giving evidence, and may compel their attendance by attachment. He may punish for disobedience of a lawful order, or for a contempt committed in his presence, by a fine of not more than $50 or imprisonment of not more than 30 days.

Title 11, District of Columbia Code, Section 1906 provides:

> Witnesses and jurors lawfully summoned in an inquest shall receive the fees and travel and subsistence allowances as may be fixed, with respect to witnesses, by chapter 119 of Title 28, United States Code, and, with respect to jurors, by section 1871 of Title 28, United States Code.

Title 22, District of Columbia Code, Section 2401, provides in pertinent part:

> Whoever, being of sound memory and discretion, kills another purposely . . . of deliberate and premeditated malice . . . is guilty of murder in the first degree.

Rule 5(c), Federal Rules of Criminal Procedure provides:

> (c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

## SUMMARY OF ARGUMENT

Appellant is in lawful custody by virtue of his indictment for first degree murder and plea of not guilty thereto. Even if his failure to receive a preliminary hearing be regarded as a procedural defect, that omission does not affect the legality of his detention, for any irregularities in the original commitment were subsequently cured. Under the *Blue* decision appellant, having chosen the route of *habeas corpus*, had the opportunity to present witnesses in his own behalf to refute the government's *prima facie* showing of probable cause; having faulted in that attack the extraordinary remedy of *habeas corpus* was properly refused.

Notwithstanding the fact that *habeas* does not properly lie in the instant case, appellant received the opportunities and information to which he was entitled under the *Blue* decision in the form of a coroner's inquest. The foundations of the charge against him were clearly outlined by Detective Crook's testimony at the inquest. The full story of the crime was revealed as was the identity and knowledge of the key government witness. Any paucity in the testimony before the coroner perceived by present counsel is attributable to appellant's counsel at the inquest who did not take advantage of the opportunity to subpoena witnesses, and who declined to cross-examine Detective Crook.

## ARGUMENT

### I. The writ of *habeas corpus* was properly discharged.

It is fundamental learning that the writ of *habeas corpus* is "a swift and imperative remedy in all cases of illegal restraint or confinement". *Fay* v. *Noia*, 372 U.S. 391 (1963) at 400. This appellant is presently in custody by virtue of the indictment and arraignment thereunder in Criminal No. 930-64. That indictment, unchallenged below, *prima facie* establishes probable cause to lawfully detain Crump for the murder of Mary Pin-

chot Meyer. *Beavers* v. *Henkel*, 194 U.S. 73, 85-87 (1904). "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359 (1965) (footnote omitted) at 363. See *Lawn* v. *United States*, 355 U.S. 339, 348-350 (1958). This demonstration of lawful custody precludes the extraordinary remedy of *habeas corpus*. *Henry* v. *Henkel*, 235 U.S. 219, 227 (1914); *United States* v. *Stevenson*, 170 F.Supp. 315, 320 (D.D.C. 1959); *In re Lewis*, 114 Fed. 963 (N.D. Fla. 1902).

Assuming *arguendo*, that the failure to provide appellant with a preliminary hearing is regarded as a procedural defect herein, that omission alone cannot operate to set him free.

"A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment." *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892) at 662; *Bilokumsky* v. *Tod*, 263 U.S. 149, 158 (1923).

". . . , [I]f the original arrest and detention had been illegal, Stallings would not be entitled to his discharge, if before final hearing in the *habeas corpus* proceedings legal cause for detaining him had arisen through the institution of removal proceedings." *Stallings* v. *Splain*, 253 U.S. 339 (1920) (Brandeis, J.) at 343. See also *Frisbie* v. *Collins*, 342 U.S. 519 (1952); *Price* v. *Johnston*, 144 F.2d 260, 261 (9th Cir.), *cert. denied*, 323 U.S. 789 (1944).

Aside from the fact that the office of the Great Writ is to strike down illegal detention, the reason courts do not look beyond lawful custody is rooted in the judiciary's refusal to perform a useless act. For example, were ap-

pellant to be released merely because he did not receive a preliminary hearing, he would be subject to lawful rearrest upon the indictment. Fed. R. Crim. P. 9.

That kind of result prompted Mr. Justice Holmes to remark in an analogous situation:

> "This proceeding is not a fox hunt. But merely to be declared free in a room with the marshal standing at the door having another warrant in his hand would be an empty form." *Kelly* v. *Griffin*, 241 U.S. 6 (1916) at 13.

Appellee does not understand *Blue* v. *United States*, —— U.S. App.D.C. ——, (No. 18401, October 29, 1964) to have extirpated these established principles of law.

Normally, attacks upon the indictment are waged in the original criminal case. Fed. R. Crim. P. 12. See *Riggins* v. *United States*, 199 U.S. 547 (1905). The *Blue* case would appear to authorize a *habeas corpus* proceeding after the return of an indictment, where one "is wrongfully denied an opportunity to present witnesses in his own behalf . . . ." (slip opinion 12). This appellant had that opportunity to affirmatively controvert the government's *prima facie* showing of probable cause at the hearing upon the writ. *Cf. Tinsley* v. *Treat*, 205 U.S. 20 (1907). Counsel however, refused to so proceed; rather than present evidence on appellant's behalf going to the issue of probable cause, she sought to compel the government to re-establish probable cause notwithstanding the indictment. The aim of so doing clearly emerged *i. e.*, pretrial discovery.[4] In these circumstances the District Court properly denied the extraordinary relief sought.

---

[4] That goal is carried forward in this appeal.

> "Here counsel does need pre-trial relief in order to effectively prepare for trial and the defense of the petitioner. Counsel has no other means of obtaining and preparing necessary information" (Br. 7).

**II. Appellant had an effective substitute for a preliminary hearing.**

Regardless of the fact that *habeas corpus* does not properly lie in the instant case, the coroner's inquest of October 19, 1964, substantially afforded appellant the opportunities and information to which he was entitled under the *Blue* decision. This Court has held that an inquest can be an effective substitute for a hearing before the Commissioner. *Carter* v. *United States*, No. 19044, Order dated February 2, 1965.

In *Blue*, the Court suggested that the purpose of a preliminary hearing is to afford the accused (1) an opportunity to establish the lack of probable cause to continue his detention and (2) "a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him." (Slip opinion 13, footnote omitted).

Since probable cause is not now in dispute we are only concerned with the second consideration. It is abundantly clear that the testimony of Detective Crook outlined the foundations of the charge against appellant. The story of the crime is known as is the identity and knowledge of the key government witness. Contrary to appellant's assertion, he is not entitled to an opportunity for an early confrontation between himself and identification witnesses against him. (Cf. Br. 15, 16).

> "The contention at bar that because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guarantee to be confronted by the witness, by mere statement demonstrates it error." *Goldsby* v. *United States*, 160 U.S. 70 (1895) at 73.

The broad principle of confrontation that appellant sees in *Washington* v. *Clemmer*, —— U.S. App. D.C. ——, (No. 18602, May 11, 1964, June 12, 1964, slip opinions 1-3),[5] vanishes upon a close inspection of all the opinions

---

[5] Appellant observes: "So important is the discovery aspect of a preliminary hearing that the accused has the right to require the

in that case. With regard to the subpoenaing of witnesses by the Commissioner, that case only held, that the Commissioner erred when he refused to authorize a subpoena *on Washington's behalf* when the defendant swore, in support thereof, that the intended witness (the complainant in a rape case) could not positively identify him. Thus, there would have been no probable cause upon which to hold him were she to testify. The opinion was specifically narrowed by the Court:

> "We decide only that under the circumstances shown here the decision and reasons of the Commissioner, on the request for the subpoena were clearly erroneous." (Per curiam panel opinion of June 12, 1964 at 5, footnote omitted).

Nor need probable cause be established by evidence sufficient to support a conviction, hearsay can suffice. See *Costello* v. *United States, supra; Brinegar* v. *United States*, 338 U.S. 160, 170-175 (1949). Compare *Draper* v. *United States*, 358 U.S. 307 (1959). Detective Crook's testimony was sufficiently trustworthy to demonstrate probable cause. He testified under oath, was present at the scene of the murder where appellant was arrested, and related the spontaneous identification by Mr. Wiggins which, because of its spontaneity has strong indicia of reliability.

If present counsel perceive any paucity in the testimony before the coroner, it is attributable to Mr. O'Neill who failed to avail himself of the opportunity to subpoena witnesses on appellant's behalf and who, inexplicably, refused to cross-examine Detective Crook. See C. Tr. 14.

It is further apparent that present counsel know or should know the names and addresses of all the material witnesses in this case. The documented request for six subpoenas before the Commissioner contains that infor-

---

Commissioner to subpoena not only witnesses whose testimony will tend to exonerate him, but all material witnesses named in the complaint who have not already been called by the Government." (Br. 16).

mation. Perhaps some traditional pre-trial groundwork on counsel's part by interviewing these witnesses might close any gaps now observed in the case.

Appellee is particularly surprised at appellant's suggestion that the prosecution in this case is secreting witnesses (Br. 17). No doubt this remark is the product of a zealous advocacy rather than considered reflection.

## CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
*United States Attorney.*

FRANK Q. NEBEKER,
ALLAN M. PALMER,
*Assistant United States Attorneys.*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 765096 630